

No. 50417-1-II

**Court of Appeals, Div. II,  
of the State of Washington**

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State of Washington,

Respondent,

v.

Katherine F. Winfrey,

Appellant.

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**Brief of Appellant**

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Kevin Hochhalter  
Attorney for Appellant

Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008  
kevin@olympicappeals.com  
WSBA # 43124

## **Table of Contents**

1. Introduction.....	1
2. Assignments of Error .....	1
3. Statement of the Case.....	2
4. Argument.....	5
4.1 The trial court erred in giving the “abiding belief” instruction, which allows a jury to convict based on a nebulous, subjective “belief” instead of requiring the state to prove every element of the charged crime beyond a reasonable doubt.....	5
4.2 The trial court abused its discretion in allowing the prosecution to cross-examine Winfrey on issues that exceeded the scope of the direct examination.....	9
5. Conclusion .....	13

## Table of Authorities

### Cases

<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007) .....	5, 6
<i>State v. Berube</i> , 171 Wn. App. 103, 286 P.3d 402 (2012) .....	7
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	7, 8, 9
<i>State v. Gefeller</i> , 76 Wn.2d 449, 458 P.2d 17 (1969) .....	10
<i>State v. Lile</i> , 188 Wn.2d 766, 398 P.3d 1052 (2017) .....	9, 11
<i>State v. Lile</i> , 193 Wn. App. 179, 373 P.3d 247 (2016).....	10, 11
<i>State v. Robideau</i> , 70 Wn.2d 994, 425 P.2d 880 (1967) .....	10
<i>State v. Winings</i> , 126 Wn. App. 75, 107 P.3d 141 (2005).....	5
<i>Sullivan v. Louisiana</i> , 508 U.S. 274, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993) .....	8

### Other Authorities

WPIC 4.01 .....	6
-----------------	---

### Rules

ER 611(b) .....	9, 13
-----------------	-------

### Treatises

Tegland, 5A Wash. Prac., Evidence Law and Practice § 611.10 (6th ed.) .....	10
--	----

## **Constitutional Provisions**

U.S. Const. amend. VI.....	9
Wash. Const. art. I, §§ 21, 22 .....	9

## 1. Introduction

Katherine Winfrey did not receive a fair trial. The jury was improperly instructed on the meaning of reasonable doubt, in a manner that impermissibly weakened the State's burden of proof. In addition, after Winfrey testified briefly in her own defense, the trial court unreasonably permitted the State to go far afield in its cross-examination, asking questions that exceeded the scope of the direct examination and were irrelevant to Winfrey's credibility on the stand. This Court should reverse Winfrey's conviction and remand for a new trial.

## 2. Assignments of Error

### Assignments of Error

1. The trial court erred in giving jury instruction # 3:  
“... A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. **If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.**” (emphasis added to highlight the challenged portion of the instruction)
2. The trial court abused its discretion in allowing the prosecution to cross-examine Ms. Winfrey on subjects that exceeded the scope of her direct examination.

### **Issues Pertaining to Assignments of Error**

1. Jury instructions must correctly explain the State's burden of proving all of the elements of the charged crime beyond a reasonable doubt. It is not the jury's role to seek out the truth. Is it error to instruct a jury that "an abiding belief in the truth of the charge" satisfies the beyond a reasonable doubt standard? (assignment of error #1)
2. Cross examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Winfrey testified on direct regarding when she possessed or abandoned her bags. The State questioned her about the alleged contents of the bags, an issue not addressed on direct. Did the trial court abuse its discretion in concluding that the State's questions were within the scope of direct?

### **3. Statement of the Case**

Katherine Winfrey went to the Tacoma Community College bookstore with her niece and a friend. 3 RP 157-58. All three women were observed behind the closed textbook counter. 2 RP 89-90. After an employee told them to put their books back on the shelves and leave the area, 2 RP 99-100, the women walked out of the store with books in their bags, 2 RP 91-92. One woman abandoned the merchandise in the store before leaving. 2 RP 91. Winfrey carried her bags past the cash registers, 2 RP 66, but abandoned them either just before or just after exiting the building, 3 RP 131, 156.

A security officer stopped Winfrey by grabbing her arm when she exited the building. 2 RP 93. Winfrey testified at trial that she was slammed down to the ground and kneed in the back by the security guard and police officers, requiring her to be taken to the hospital. 3 RP 156-57. Winfrey was singled out for this physical treatment. 3 RP 157.

Winfrey's testimony on direct examination was limited in scope. *See* 3 RP 154-57. She discussed only the timing of when she handed off the bags, 3 RP 154-56, and the manner of her detention, 3 RP 156-57. On cross-examination, the prosecutor began to inquire about the books that were allegedly in Winfrey's bags. 3 RP 159. Winfrey's counsel objected that the questioning was outside the scope of the direct examination. *Id.* The prosecutor argued that the questions went to Winfrey's credibility. *Id.* The trial court allowed the prosecutor's line of questioning over Winfrey's objection. 3 RP 160.

Winfrey's counsel objected to jury instruction #3, which described the State's burden of proof. 3 RP 179. The instruction read as follows:

The defendant has entered a plea of not guilty.  
That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. **If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.**

CP 19 (emphasis added to highlight the portion to which Winfrey objected).

Winfrey's counsel argued that the final sentence regarding "an abiding belief in the truth of the charge" was confusing and not helpful to the jury. 3 RP 179. The trial court gave the instruction as written, with the "abiding belief" language. 3 RP 180.

The jury found Winfrey guilty of theft in the second degree. CP 32. She was sentenced to 24 months in prison. CP 48.



## **4. Argument**

### **4.1 The trial court erred in giving the “abiding belief” instruction, which allows a jury to convict based on a nebulous, subjective “belief” instead of requiring the state to prove every element of the charged crime beyond a reasonable doubt.**

Errors of law in jury instructions are reviewed de novo.

*State v. Winings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005).

A jury instruction is improper if it misleads the jury or misstates the applicable law. *Id.* The “abiding belief” instruction is improper because it misleads the jury regarding the State’s burden of proof.

“The presumption of innocence is the bedrock upon which the criminal justice system stands.” *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Courts must be vigilant to protect the presumption of innocence. *Id.* at 316. The presumption can be diluted or washed away if reasonable doubt is not properly defined in the jury instructions. *Id.*

“Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” *Bennett*, 161 Wn.2d at 307. The instructions must define reasonable doubt in such a way that does not relieve the State of its burden. *Id.*

The *Bennett* court declared, “the presumption of innocence is simply too fundamental, too central to the core of

the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction.” *Bennett*, 161 Wn.2d at 317-18. The *Bennett* court instructed trial courts to use the pattern instruction, WPIC 4.01. *Id.* at 318. The pattern instruction reads as follows:

[The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]

WPIC 4.01. The *Bennett* court did not comment on the final, bracketed sentence.

The final sentence, which was included by the trial court in this case, over Winfrey’s objection, misleads the jury. It allows

the jury to convict based on a nebulous, subjective, “belief in the truth of the charge,” rather than requiring the State to prove every element of the crime beyond a reasonable doubt. A juror may “belie[ve] in the truth of the charge” for any number of impermissible reasons, such as race, religion, age, or gender. A juror may have an abiding belief that the prosecutor would only charge a person who was actually guilty. Any of these “abiding belief[s]” would allow the jury to convict the defendant even if the State had failed to prove one or more elements beyond a reasonable doubt. The bracketed sentence would improperly allow a jury to convict based on feelings instead of evidence.

Our Supreme Court returned to this issue of “belief in the truth” in *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012). In *Emery*, the prosecutor, in closing argument, encouraged the jury to “speak the truth” through its verdict. *Id.* at 751. The *Emery* court found the prosecutor’s statements improper. *Id.* at 760. The court stated emphatically, “The jury’s job is not to determine the truth of what happened ... Rather, a jury’s job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Id.*

Division I of this court agreed in *State v. Berube*, 171 Wn. App. 103, 120-21, 286 P.3d 402 (2012):

A criminal trial may in some ways be a search for truth. But truth is not the jury’s job. And arguing

that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden. The question for any jury is whether the burden of proof has been carried by the party who bears it. In a criminal case, the State must prove its case beyond a reasonable doubt. The jury cannot discern whether that has occurred without examining the evidence for reasonable doubt.

In other words, the jury's role is to test the substance of the prosecutor's evidence—to ensure every element of the crime has been proved beyond a reasonable doubt. The jury is not to search for the truth or seek for an “abiding belief in the truth of the charge.” The jury must ensure that the charge has been proven, not simply believed.

Just as the prosecutor's arguments in *Emery* were improper, so is the last sentence of the jury instruction. The last sentence of the instruction improperly misleads the jury by inviting them to search for a “belief in the truth of the charge” as a shortcut for determining if the State has met its burden. This invitation misstates the burden and allows conviction without proof of every element beyond a reasonable doubt.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan v. Louisiana*, 508 U.S. 274, 281-82, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993). “[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of

prejudice.” *Emery*, 174 Wn.2d at 757 (quoting *Sullivan*, 508 U.S. at 281-82). This Court should find that instructing the jury to treat proof beyond a reasonable doubt as the equivalent of having an “abiding belief in the truth of the charge” misstates the State’s burden of proof, confuses the jury’s role, and denies the accused the right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22.

The trial court erred in including the final sentence of the instruction, over Winfrey’s objection. This Court should reverse Winfrey’s conviction and remand for a new trial.

#### **4.2 The trial court abused its discretion in allowing the prosecution to cross-examine Winfrey on issues that exceeded the scope of the direct examination.**

Issues of the scope of cross-examination are reviewed for manifest abuse of discretion. *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017). “A manifest abuse of discretion arises when the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *Id.*

Rule of Evidence 611(b) limits the scope of cross-examination to “the subject matter of the direct examination and matters affecting the credibility of the witness.” Matters affecting credibility are those that can be raised by the various methods of impeachment covered under other Rules of Evidence,

such as bias, mental or sensory difficulties, prior misconduct, criminal convictions, and prior inconsistent statements. Tegland, 5A Wash. Prac., Evidence Law and Practice § 611.10 (6th ed.). Aside from these methods of impeachment, cross-examination must be limited to the subject matter of the direct examination.

However, “when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.” *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Thus, a witness is said to “open the door” to cross-examination on a subject if the witness testifies to that particular subject on direct examination. *See State v. Robideau*, 70 Wn.2d 994, 997, 425 P.2d 880 (1967) (when a general subject is unfolded on direct examination, “the cross-examination may develop and explore the various phases of that subject”).

For example, in *State v. Lile*, 193 Wn. App. 179, 373 P.3d 247 (2016), this Court addressed the question of whether a certain line of questioning on cross-examination was within the scope of a witness’s statement on direct examination that he “was not a fighter”:

Rowles did not testify that he was a peaceful person. ... Nor did he testify that he had never been

aggressive or threatening, only that he was not a fighter. Therefore, Rowles's testimony would not have opened the door to evidence that Rowles is generally not peaceful or that Rowles is generally aggressive. It would have opened the door to only evidence that Rowles is a fighter or was the initial aggressor in the fight—evidence directly contradicting Rowles's testimony and challenging his credibility.

*Lile*, 193 Wn. App. at 201. The court noted that the cross-examination was outside the scope of direct because it was not probative of whether he was a fighter. *Id.* at 202. The Supreme Court affirmed on this issue. *Lile*, 188 Wn.2d at 784. To be within the scope of direct examination, the questions on cross-examination must seek to explain or contradict the testimony on direct.

Winfrey's direct examination explored only two subjects: the timing of when she possessed or abandoned the bags, 3 RP 154-56, and the excessively physical manner of her detention by security and police, 3 RP 156-57. On cross-examination, the State inquired regarding the books that were allegedly in the bags, and whether Winfrey had put them there. *E.g.*, 3 RP 160. Winfrey objected. 3 RP 159. The State argued that the questions went to Winfrey's credibility, and the trial court overruled Winfrey's objection. 3 RP 159-60.

It was unreasonable for the trial court to conclude that the questions went to Winfrey's credibility or were otherwise

within the scope of the direct examination. The State's questions did not address bias, mental or sensory difficulties, prior misconduct, criminal convictions, or prior inconsistent statements (the traditional methods of impeachment). The only other way the State's questions could have been relevant to credibility was if Winfrey's answers contradicted her direct testimony. This could not happen because Winfrey's direct testimony never addressed the subject of the State's questions: the books.

The State's questions did not seek to explain or contradict Winfrey's testimony about when she did or did not possess the bags. Winfrey testified that she handed her bags off before leaving the building. This testimony does not open the door to an exploration of what the books were or whether Winfrey took them. The only questions the State could have asked that would have been relevant to Winfrey's credibility would have been questions directly challenging her testimony about handing off the bags or about the physical nature of her detention. It was unreasonable for the trial court to conclude that the State's questions went to credibility or related to the subject matter of the direct examination. The trial court abused its discretion in allowing the State's questions.

As a result of the State's improper line of questioning, Winfrey made a number of damaging statements and



admissions that almost certainly led directly to her conviction. In answer to the improper questions, Winfrey gave rambling answers, 3 RP 160-61; admitted to placing some of the books in her bag, 3 RP 162; admitted to walking past the cash register, with the books, without paying, 3 RP 167-68, 171-72; and admitted to a history of committing forgery, 3 RP 169. None of these admissions would have come out if the trial court had properly limited the scope of the State's cross-examination. Without these admissions, the State had no witness testimony that Winfrey had placed any of the books into her bags, raising a reasonable doubt as to whether Winfrey intended to steal the books.

The trial court abused its discretion in concluding that the State's questions were admissible under ER 611(b). The trial court's abuse of discretion in allowing these improper questions was highly prejudicial to Winfrey. This Court should reverse and remand for a new trial.

## **5. Conclusion**

The trial court erred in including the final sentence of the jury instruction on reasonable doubt, allowing the jury to convict on the basis of a nebulous, subjective "belief in the truth of the charge" rather than requiring the State to prove every element

beyond a reasonable doubt. This Court should reverse the conviction and remand for a new trial.

Even if the Court finds no error in the jury instruction, the trial court abused its discretion in allowing the State to engage in a line of questioning on cross-examination that was outside the scope of the direct examination and was not relevant to Winfrey's credibility on the stand. The improper questioning was highly prejudicial. This Court should reverse and remand for a new trial.

Respectfully submitted this 9<sup>th</sup> day of October, 2017.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Attorney for Appellant  
[kevin@olympicappeals.com](mailto:kevin@olympicappeals.com)  
Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008

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Michelle Hyer  
Pierce County Prosecuting Attorney's Office  
930 Tacoma Avenue S., Room 946  
Tacoma, WA 98402-2102  
pcpatcecf@co.pierce.wa.us

DATED this 9<sup>th</sup> day of October, 2017.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Attorney for Appellant  
[kevin@olympicappeals.com](mailto:kevin@olympicappeals.com)  
Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008

# OLYMPIC APPEALS PLLC

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**Appellate Court Case Title:** State of Washington, Respondent v Katherine F. Winfrey, Appellant  
**Superior Court Case Number:** 16-1-02647-0

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